

2010: A Year of Many Changes in Elder Law and Special Needs Planning

The year 2010 was a busy one with many changes in the elder law, estate planning and special needs planning areas. We began the year with little congressional action and ended it with a flurry of activity. In this issue of *The ElderCounselor*[™], we will review some of the most important changes that took place, and consider what may happen in the years to come.

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Tax Code Changes

Interestingly, the year 2010 began with Congress failing to act, which resulted in no estate tax for decedents dying in 2010. The collateral effect of this failure to act was the return of carryover basis rather than stepped-up basis for assets owned by a decedent. (A prior issue of *The ElderCounselor*[™] analyzed these changes in detail.)

While assets in a wholly owned grantor trust were eligible for the modified carry-over basis (up to \$1.3 million for a single decedent and \$3 million for a married spouse), life estate interests did not receive the same favorable treatment and would have been ineligible for a step-up in basis at the death of the life estate holder. In late 2010 Congress finally acted, passing new laws that provided in part for a \$5 million estate tax exemption, a \$5 million lifetime exemption for gifts, a 35% tax rate for both estate and gift taxes, and full basis adjustment to date of death value.

However, executors for those who died in 2010 have the option of electing no estate tax with a modified carryover basis (unlimited step-down for loss assets and a limited step-up of \$1.3 million plus \$3 million for assets passing to a spouse). Executors have an additional nine months after the enactment date to decide, file an estate tax return, pay taxes and make disclaimers.

Planning Note: The executor of an estate in 2010 with less than \$5 million can elect to administer the estate under the new laws that provide full step-up in basis for all property, including property in which a life estate was reserved by the decedent or property held in a wholly owned irrevocable grantor trust.

Additional income tax provisions. Individual tax rates will remain at 2010 levels (10, 15, 28, 33 and 35%) for two more years. If no action had been taken, all of those tax rates would have increased.

Tax on long-term capital gains remains at 15% for two more years, and would have increased to 20% without the 2010 changes. In addition, taxpayers will not see their itemized deductions or personal exemptions limited due to income levels in 2011 or 2012.

The above changes expire in two years. On January 1, 2013, if Congress does not act again, the gift, estate and GST exemptions will be \$1 million (adjusted for inflation) and the top tax rate will be 55%.

Health Care Reform

In March 2010, the Patient Protection and Affordable Care Act of 2010 and the Health Care and Education Affordability Reconciliation Act of 2010 ("The Act") were signed into law making sweeping changes to health care as we currently know it, including the introduction of new programs aimed to assist older Americans with long term care.

A number of changes were made to the Medicare program. For example, older adults will no longer have to pay out of pocket for preventive care services such as cancer and diabetes screenings. Effective January 1, 2011, all deductibles and co-insurance for preventive benefits will be eliminated. Medicare recipients will also receive one free annual wellness visit.

Other notable Medicare changes include closing coverage gap in the Medicare Part D prescription drug benefit, often called the "doughnut hole," by 2020. Beneficiaries who fell into the doughnut hole in 2010 were scheduled to receive a \$250 rebate, followed by increasing discounts on certain prescription drugs in the years to follow.

The Act also included changes to Medicaid, including a plan to offer incentives to states that implement or increase home and community based services.

Finally, the Act included offering government-operated long term care insurance plans to working adults whose paychecks would be deducted unless they opted out.

The Act will most likely come under fire in 2011 with some leaders in Congress vowing to pursue repeal.

Planning Note: An attempt to repeal health care reform could take place in 2011.

New Requirements for Self-Settled Special Needs Trusts

Due to a change in the Program Operations Manual System ("POMS"), beginning October 1, 2010, the assets in a self-settled special needs trust drafted on or after January 1, 2000, will be considered available for SSI or Medicaid purposes if the trust contains early termination language (language that provides for termination during the life of the special needs beneficiary). However, the new rule also provides a safe haven for those trusts that do contain early termination language.

To fall within the safe haven, the trust must contain language providing for repayment to the state (with other allowable expenses either prior to or subsequent to reimbursement) upon termination of the trust. Normally, repayment to the state occurs at the death of the special needs beneficiary.

Pooled trusts that only allow payment into another pooled trust upon early termination are acceptable under the new POMS.

Trustees of any self-settled special needs trust must act quickly, as a trust that does not comply with the new POMS must be amended within 60 days of discovering the problem, otherwise the trust assets will be deemed available for Medicaid or SSI benefits and those benefits could be lost.

Planning Note: All self-settled special needs trusts drafted on or after January 1, 2000, should be reviewed to ensure compliance with the new POMS.

Conclusion

2010 held many changes in the elder law, estate planning and special needs planning areas. With new leadership in Congress it is probable that the next few years will also be filled with additional changes that could significantly impact both our senior population and anyone living with a disability. Great care must be taken when planning for individuals and married couples to take advantage of opportunities that have been presented and to avoid pitfalls created by the numerous law changes.

Please contact us if you would like additional information on any of the topics addressed in this newsletter or if you would like to discuss a specific issue.

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